## BRIEF IN SUPPORT OF PETITION.

### Opinions Below.

The opinion of the United States District Court for the Southern District of New York, appears at page 268 of the record.

The opinion of the Circuit Court of Appeals for the Second Circuit appears at last pages of the record and is reported in 137 Fed. (2d) 911.

### Jurisdiction.

Statement as to jurisdiction is made at page 7 of the petition.

### Statement Of The Case And Questions Presented.

A summary of the statement of the case and the questions presented is set forth in the petition.

### Specification Of Assigned Errors.

It is intended by the petitioner to urge the assignments of error filed in the lower Court (584-591) and presented in the petition. In substance these assignments include the following:

1. It was error to deny petitioner's demand for common law proof of all of the issues herein (584);

2. It was error to admit over petitioner's objection the affidavit of McMackin as to the ownership of the beans and

validity of the warehouse receipts, in violation of the hearsay rule and for which no proper foundation had been laid.

3. It was error of the Court below to usurp the function of the jury and to resolve the issues of fact as to petitioner's ownership of the beans and the validity of the warehouse receipts.

4. It was error to admit over petitioner's objections, the reclamation order in bankruptcy, since it was not res adjudicata.

5. It was error of the Court to usurp the function of the jury and to resolve questions of fact which were raised by the facts and circumstances surrounding the transaction as to:

(a) the nature and extent of the agency of Stake to act on behalf of Federal;

(b) the meaning of "non-delivery" as used by the parties;

(c) the insurance coverage.

## ARGUMENT.

### POINT I.

**The issues as to the validity of the warehouse receipts and the ownership of the cocoa beans were substantial issues of fact. The proof presented by the respondent and accepted by the Court was inadmissible and contradicted.**

Appellant's proof of ownership and interest in the cocoa beans was substantial. It rested upon documentary proof (warehouse receipts), affidavits, warehouse records. The appellant was estopped to dispute appellant's ownership, interest in the cocoa beans or validity of the warehouse receipts.

The Courts below disregarded the presumptive validity of the warehouse receipts which upon their face showed the appellant to be the owner or party interested in the cocoa beans. Appellant was not an endorsee of the receipts. They were duly made out to appellant by John J. McMackin, Secretary of Harbor Stores Corporation, against 18,480 bags of cocoa beans in the warehouse answering the description in the receipts at which time the inventory records showed that Garcia had over 90,000 bags of cocoa beans in the warehouse (McMackin, 593-595; Kehrer, 172).

The warehouse receipts are prima facie proof of ownership (Driggs v. Dean, 167 N. Y. 121), the burden to prove that petitioner was not the owner of the cocoa beans was upon the respondent.

In Merchants' National Bank v. Roxbury Distributing Co., 196 F. 76 (D. C., Md.), the Court held that the holder of a warehouse certificate is the owner of the goods described in the certificate. Golden v. Romer, et al., 20 Hun 438 (N. Y.); and Herrman v. New England Navigation Co., 143 App. Div. 551 (N. Y.).

The validity of the warehouse receipts is a question of fact for the jury.

In *Etting* v. *Bank*, 11 Wheat. 59, Chief Justice Marshall, for the Court, declared the law thus:

> "Although it is the province of the court to construe written instruments, yet when the effect of such instruments depends, not merely on the construction and meaning of the instrument, but upon collateral facts in pais, and extrinsic circumstances, the inferences of fact to be drawn from them are to be left to the jury." See also West v. Smith, 101 U. S. 270.

Respondent's claim of non-ownership on the part of appellant rested upon inadmissible, incompetent and insufficient evidence. It rested upon McMackin's affidavit (440-476) and upon the orders in the reclamation proceeding. As the record shows (525-606), the respondent, McMackin's affidavit was entirely hearsay, was not made on the personal knowledge of McMackin, was a purported resume of alleged records which were not offered in evidence, and accordingly was not the best evidence. There was no proof that the records were kept in the regular course of business, that McMackin had any knowledge of the same, that they were kept under his direction and control, or that he knew anything about their accuracy.

On the other hand, a few days later the same McMackin (who had issued the warehouse receipts to the petitioner over his own signature), by means of another affidavit (591), contradicted his first affidavit on every point and stated that the records were not made up by him or in his presence or under his supervision and that "I have no personal knowledge of how they were made up nor do I have any knowledge of their accuracy" and that he had no duties with respect to the records which were kept at the warehouse in Long Island City whereas he was stationed in the Manhattan office of the warehouse corpora-

tion. Furthermore, no proper foundation was laid for the introduction of these records in evidence. As a matter of fact they were never offered in evidence. Yet the finding of the Court below rests upon records which were not even before the Court. It is most respectfully submitted that the ruling of the Court below on this point is in direct conflict with well settled law and more particularly with the decision of this Court in *Palmer* v. *Hoffman*, 318 U. S. 109.

The decision of the Court below on the foregoing points is in conflict with the decisions aforecited as well as the following:

Kittredge v. Grannis, et al., 236 N. Y. 375.
Johnson v. Lutz, et al., 253 N. Y. 124, 128.
Nickelson v. Nestles Milk Products Corp., Inc., 107 F. 2d 17 (5th Circuit).

## POINT II.

**The reclamation proceeding orders are not binding on petitioner and are inadmissible.**

The respondents stressed the reclamation orders (477-518) to show that petitioner had no insurable interest. But the reclamation order spoke as of the time of the bankruptcy and not as of the time of the issuance of the insurance months earlier.

Furthermore, in the case of *Little & Christman* v. *General Ins. Co. of America*, S. D., N. Y. Civ. 8-500, which arose out of the Garcia and Harbor Stores warehouse bankruptcies, Judge Hulbert held that an even more stringent reclamation order denying Little & Christman's claim for certain sugar based on warehouse receipts was not binding on Little & Christman in its action against the insurance company. This is in accord with basic law and

with the decisions of this Court holding that where there is no identity of subject and parties a prior order or judgment is not res adjudicata. *Brown* v. *Fletcher's Estate*, 210 U. S. 82; *Ingersoll* v. *Coram*, 211 U. S. 335; *Troxell* v. *Delaware, Lackawanna & Western R. R. Co.*, 227 U. S. 443. Although the Court below in its opinion, noted the resettled reclamation proceeding order, it made no comment.

## POINT III.

**The nature and extent of agency of Stake to enter into an insurance contract on behalf of Federal Insurance Company and make representations with respect thereto are issues of fact, particularly where, as the Court below found, there is substantial documentary as well as oral proof submitted in support of petitioner's allegations.**

The insurance certificate was an independent policy, *Aetna Ins. Co.* v. *Willys Overland, Inc.*, 288 Fed. 912 (N. D., Ohio), and admittedly depended for its validity upon the countersignature of Stake. Stake admitted (213) that for a period of many years prior to the transaction herein, it kept a set of certificate forms on its premises which had been given to it by respondent. (A full set of these forms is set out in Tab #3 of the exhibit book.) The Court's attention is directed to the completely blank appearance of these forms. Nothing is said as to the insured, coverage, perils, risks, etc. The forms on their lower right-hand sides bear the original signature of respondent's managers. In other words, as far back as 1933 respondent gave Stake a blank check (231).

This blank check authority by respondent (a foreign insurance company) to Stake, its resident agent, to fill in the terms and conditions and generally all of the typewritten matter appearing in the certificate, and to countersign is very broad authority indeed. It necessarily car-

ries with it a great amount of discretion and the authority to explain as well as to fix its terms and conditions.

As was said in *Pritchard* v. *Connecticut Fire Ins. Co.*, 203 S. W. 244:

> "Defendant makes the point that the only power conferred upon its agents at Nevada was the power to solicit applications for insurance, and to submit them to the company for approval before any insurance became binding upon the company; that the agents could not bind the company by a verbal contract of insurance. This point is not well taken. It was said by this court in *Sheets and Day* v. *Insurance Co.*, 153 Mo. App. 633, 135 S. W. 84:
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> > 'We are not saying that a foreign insurance company may not employ soliciting agents of limited powers in this state, but we are holding that countersigning resident agents are presumed to possess authority to make contracts of insurance for their principals.' "

To same effect: *Ohio Casualty Ins. Co.* v. *Callaway*, 134 Fed. (2) 788 (C. C. A. 10).

Prior course of dealing shows Stake as agent of respondent with the broadest powers (324-27).

The respondent through Bonner was directly and fully informed of the nature of the discussions, the insurance coverage given (210, 211, 212, 215-6, 221, 276, 338).

## POINT IV.

**The nature of the insurance contract and the meaning of "non-delivery" could only be determined in light of the surrounding circumstances, particularly where the intended meaning and coverage of "non-delivery" had been agreed upon by the parties and relied upon by the petitioner in risking $110,000.**

In *Compania de Navagacion* v. *Insurance Co.*, 277 U. S. 66, 80, this Court speaking of an insurance contract said:

> "Its construction was affected necessarily by the special circumstances surrounding the contract known to both parties and counted on by them. * * *"

This identical principle is applied also in:

*Strochmann* v. *Mutual Life Insurance Company*, 300 U. S. 435;
*Aldrich* v. *New York Life Insurance Company*, 235 N. Y. 214;
*Nellis* v. *Western Life Indemnity Co.*, 207 N. Y. 320;
*Bushey & Sons* v. *American Insurance Company*, 237 N. Y. 24;
*Matter of Garelick* v. *Rosen*, 274 N. Y. 64.

Similar is *Aetna Casualty & Surety Co.* v. *National Bank of Tacoma*, 59 F. (2d) 493 (C. C. A. 9).

Appellant submitted uncontradicted proof that appellant had actual and constructive possession of the cocoa beans (97, 177). This was an issue of fact. *Driggs* v. *Dean*, 167 N. Y. 121. The importance of this point is that it is well settled that regardless of whether or not the insured was the owner of the goods, as long as he had possession, he had insurable interest. *Fireman's Fund Ins. Co. of Cal.* v. *Vinton*, 190 N. Y. Supp. 525; *Norris* v. *Alliance Ins. Co. of Phila.*, 123 A. 762; *Saverese* v. *Hartford Fire Ins. Co.*, 123 A. 763.

"Non-delivery" has nothing to do with ownership or existence of goods. The mere failure to deliver is sufficient. At the outset, it should be noted that petitioner was already insured against physical risks, such as fire, theft, sprinkler damage, etc.

This was a risk wholly apart from and having nothing to do with the physical perils. By contract it was peculiarly a risk of default by the warehouseman—its "failure * * * to perform the contract." (*Corporation of Royal Exchange Assurance* v. *U. S.*, 75 F. (2d) 478 (C. C. A. 2), 480.)—whatever the reason.

In *National Bank* v. *Aetna Casualty & Surety Co.*, 296 Pac. 831 (Sup. Ct., Wash., 1931), there was the following set up. The defendant insurance company issued an indemnity bond binding themselves and the Wood Pipe Company to the Twin Harbors Company for any damages claimed or suffered for lack of delivery of the materials within the time called for. Upon receipt of these papers the bank loaned the Wood Pipe Company a large sum of money. The bank recovered on the bond, the Court stating that the insurance was not to be considered as on specific goods which were non-existent but rather was to indemnify the insured against loss for failure to deliver the order.

This case was relitigated in the Federal Courts in 1932, *Aetna Casualty & Surety Co.* v. *National Bank of Tacoma*, 59 F. (2d) 493, where the insurance company was again held liable. See also *Ryan* v. *U. S.*, 19 Wallace 514.

The Court has before it a business transaction in which the petitioner has been exposed to certain risks. It is basic that a risk of loss may be shifted to another in consideration of a payment of a premium (*Coleman* v. *Eyre*, 45 N. Y. 38). This principle has always remained the same (*Restatement of the Law of Contract*, Ch. 18, Sec. 520). But the risks have multiplied as trading and commerce have developed and the needs of business, particularly in modern

times, have become more complex and varied. Insurance is always broad enough to cover the business need. The law has placed but one limitation upon an insurance contract; i. e., that it cannot be a mere wager. This limitation was placed thereon for reasons of public policy. However, under common law, insurable interest was not necessary in Marine Insurance (*Cooley*, Vol. 1, p. 90, citing *Amory* v. *Gilman*, 2 Mass. 1).

### Insurance Is Indemnity Against Loss.

As stated in 1 Cooley, 7, 114-115: "The dominant feature of the contract is to grant indemnity or security against loss by reason of the risk (*Everley* v. *Equitable Surety Co.*, 190 Ind. 274, 130 N. E. 227). The contract may indemnify against any sort of risk so long as it is not a 'mere cover for a wager' (*Empire Development Co.* v. *Title Guarantee & Trust Co.*, 225 N. Y. 53, 121 N. E. 468)."

As Cooley, therefore, concludes (p. 143) and the authorities uniformly recognize, the general rule is that "whenever * * * the impairment or breach of any right, duty or obligation, would result in a diminution of estate, an interest in such * * * right, duty, or obligation is a proper subject of insurance" (1 Arnould 438).

It is the financial stake of the person rather than property that is insured against loss. "It is not an insurance of the specific thing which is the subject of the insurance." (*Cooley Briefs on Insurance*, Vol. 1, p. 116, citing *Columbian Ins. Co.* v. *Lawrence*, 10 Pet. 507, 9 L. Ed. 512.) See also: *Traders Insurance Company* v. *Newman*, 120 Ind. 544, 22 N. E. 428. *Cummings* v. *Insurance Co.*, 55 N. H. 457.

The test is risk of loss, as stated by Chief Justice Marshall, in the leading case of *Columbian Ins. Co.* v. *Lawrence*, 2 Pet. 25, at 46-47:

"That an equitable interest may be insured is admitted. We can perceive no reason which excludes an interest held under an executory contract. While the contract subsists, the person claiming under it has undoubtedly a substantial interest in the property. If it be destroyed, the loss, in contemplation of law, is his." *Phoenix Ins. Co.* v. *Erie Transportation Co.*, 117 U. S. 312, 323; *Rohrbach* v. *Germania Fire Ins. Co.* (supra); *Nat'l Filtering Oil Co.* v. *Citizens' Ins. Co., supra; Lucena* v. *Craufurd*, 2 Bos. & Pul. (N. S.) 269, 127 Eng. Rep. full reprint 630, 639. *Hooper* v. *Robinson*, 98 U. S. 528.

The *New York Insurance Law*, Sec. 169, which was in effect at the time of the transaction herein recognized the doctrine of the aforecited authorities. Subdivision 4 specifically referred to "a bona fide expectation of acquiring such an interest."

See also

Columbian Ins. Co. v. Lawrence, 10 Pet. 507, 9 L. Ed. 512.

Provident Trust Co. v. Nat. Surety Co., 44 Fed. Supp. 514 (D. C. W. D. Pa., 1942).

Maryland Casualty Co. v. Washington Loan & Banking Co., 145 S. E. 761.

Ryan v. United States, 19 Wallace (86 U. S.) 514.

Berry v. A. C. Insurance Co., 132 N. Y. 49.

Empire Development Co. v. Title Guarantee & Trust Co., 225 N. Y. 53 (1918).

Buck v. Chesapeake Insurance Co., 1 Pet. 151.

Craufurd, et al. v. Hunter, 8 D. & D. 13.

Stock v. Inglis, 12 Q. B. 564, 571, affd. 10 A. C. 263 (H. L. 1885).

## CONCLUSION.

**It is urged, therefore, that the petition be granted for the reasons hereinbefore set forth and that the decision below is in conflict with the authorities herein cited.**

Respectfully submitted,

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